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NOTES.

PRESENCE OF DEFENDANT AT RENDITION OF VERDICT IN FELONY CASES.—Trial by jury in criminal cases is guaranteed in the States by constitutional provisions.[1] The trial includes all of the proceedings through the rendition of the verdict, and it is a firmly established rule that "in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court."[2] This is universally construed to mean that in cases of felony the verdict must be delivered in the presence of the defendant in open court.[3] The rule seems to be based

[1]See note to case of Gore *v.* State (Ark. 1889) 5 L. R. A. 832, 835.

[2]2 Co. Lit., 227, b.

[3]Archbold, Criminal Pleading, Evidence, & Practice (24th ed.) 226; 1 Chitty, Criminal Law, *636.

upon two reasons: first, that the defendant may personally poll the jury; secondly, that he may be in the power of the court and subject to its judgment,[4] since judgment cannot be passed upon him in his absence.[5] This principle has become so deeply rooted in our system of criminal practice that a verdict rendered in the enforced absence of the accused has been held by many courts to be an absolute nullity, and a complete bar to a further prosecution for the same offense.[6] The reasoning of the courts proceeds upon the theory that the defendant having been placed in jeopardy, is entitled to have his guilt or innocence legally determined by the particular jury, and a verdict in his absence being void, is equivalent to an acquittal.[7] The obvious fallacy of this, however, is that the jury did in fact render a true verdict of guilty, irregular though it be, and so the court, in its zealousness to safeguard the accused, is invoking a fiction to defeat the administration of justice, whereas fictions are properly resorted to only in furtherance of justice.[8]

As to whether the defendant himself may waive the right to be present, there is a conflict of authority among the States.[9] The reason usually assigned for the view prohibiting a waiver is that the privilege, while for the benefit of the accused, is primarily dictated by the interests of the State.[10] But all laws are based upon public interests, and to disallow a waiver on that ground alone is to forbid it in every case. The only real benefit the defendant derives from his presence is the right to poll the jury. This is something that is essentially personal, and, since the privilege is exercisable entirely at his volition, there should be no objection to allowing him to waive it altogether. The other necessity, public in character, for the defendant's presence, is that judgment may be passed upon him. But since judgment can be rendered at any time after the reception of the verdict that the defendant's presence may be secured, this difficulty is obviated. Moreover, the view that an express waiver should be allowed, is fortified by cases where a

[4] See People *v.* Perkins (N. Y. 1828) 1 Wend. 91; Price *v.* State (1858) 36 Miss. 531.

[5] *Cf.* State *v.* Dolan (1905) 58 W. Va. 263; Rex *v.* Harris (1697) 1 T. Raym. 267.

[6] Nolan *v.* State (1875) 55 Ga. 521; Harris *v.* State (1907) 153 Ala. 19; Finch *v.* State (1876) 53 Miss. 363; but *cf.* People *v.* M'Kay (N. Y. 1820) 18 Johns. *212, *215. When, however, the jury is discharged at the defendant's request, or with his consent, he may be tried anew. Commonwealth *v.* Sholes (Mass. 1866) 13 Allen 554; McCorkle *v.* State (1859) 14 Ind. 39.

[7] See Nolan *v.* State, *supra*; Wells *v.* State (1906) 147 Ala. 140.

[8] Where, however, the court, without legal necessity, discharges the jury in the absence of the defendant and before it has returned a verdict, this reasoning would not apply, and the defendant should be discharged. See note to case of Upchurch *v.* State (Tex. 1896) 44 L. R. A. 694.

[9] 1 Bishop, New Criminal Procedure (2nd ed.) 238. Some courts allow waiver in felony cases generally, Beale, Criminal Pleading & Practice, § 215, but not in capital cases. See 9 Columbia Law Rev. 178; State *v.* Cherry (1911) 154 N. C. 624; *contra,* Cawthon *v.* State (1904) 119 Ga. 395. This exception seems to be the rule in the federal courts. See Hopt *v.* Utah, *infra*; Lewis *v.* United States (1892) 146 U. S. 370.

[10] 1 Bishop, New Criminal Procedure (2nd ed.) 238; 2 Willoughby, Constitutional Law, § 419.

defendant who absconds while on bail, is deemed to have waived his right to be present at the rendition of the verdict.[11]

It is often held that a waiver by counsel unattended by any act of ratification by the defendant, will not be valid.[12] This illustrates the extremity to which courts go in protecting the accused, for, since counsel is supposed to be always on the alert to safeguard every possible interest of his client, and since he should be better qualified to say what is for the best interests of the accused, ample justification might be found for a contrary view. In the recent case of *Frank* v. *State* (Ga. 1914) 83 S. E. 645, the court expressed its opinion that a waiver by counsel of defendant's presence at the rendition of the verdict in a capital case, and a failure of the accused to make any objection to it in a later motion for a new trial, amounted to an acquiescence in the waiver sufficient to preclude its use as a basis for a subsequent motion to set aside the verdict as unconstitutional under the Fourteenth Amendment.[13]

The Fourteenth Amendment does not require a jury trial as a necessary requisite for due process in the State.[14] Likewise, it does not prevent any departure from the customary practice in any of the incidents of jury trial, where the State shall deem it conducive to the public welfare and not repugnant to the ends of justice.[15] In *Hopt* v. *Utah*,[16] the Supreme Court declared that the right to be present at every part of the proceedings in a felony case could not be waived, but this was a decision in regard to the practice in federal courts, and not in reference to the powers of the State under the Fourteenth

[11]Barton *v.* State (1881) 67 Ga. 653; Commonwealth *v.* McCarthy (1895) 163 Mass. 458, in which the court, alluding to the defendant's absence at the time of the reception of the verdict, says at p. 460: "There is no very important reason for requiring the defendant's presence then."

[12]Shipp *v.* State (1881) 11 Tex. App. 46; State *v.* Jenkins (1881) 84 N. C. 812. The failure of counsel to take exception will not generally be binding upon the defendant. Maurer *v.* People (1870) 43 N. Y. 1; Percer *v.* State (1907) 118 Tenn. 765.

[13]A writ of error was refused by two justices of the Supreme Court, on the ground that the decision by the State court did not involve the determination of any federal question but was a ruling merely on a question of State practice. In this view of the case, that part of the opinion dealing with the waiver of the defendant's presence would seem to be dictum.

[14]See 1 Harvard Law Rev. 318. In Maxwell *v.* Dow, *infra*, Mr. Justice Peckham, delivering the opinion, says, at p. 603, "Trial by jury has never been affirmed to be a necessary requisite of due process of law."

[15]*Cf.* 2 Story, Constitutional Law (5th ed.) § 1947; Maxwell *v.* Dow, *infra*, p. 605.

[16](1884) 110 U. S. 574. Utah at the time was a territory, and the provisions of the Constitution applicable to the federal government in reference to trial by jury and due process, were construed, see Thompson *v.* Utah (1898) 170 U. S. 343, 349, and not the Fourteenth Amendment which applies only to a State. Moreover, the Supreme Court rendered its decision not in the light of the Constitution, but as an appellate court in the enforcement of a provision in the Criminal Code of Utah, which required that the "defendant must be personally present at the trial." It is interesting to note that Mr. Justice Harlan, who delivered the opinion in the case, was overruled in most of the subsequent leading cases in regard to his view of the relation of the Fourteenth Amendment to the States.

Amendment.[17] The Court has held that the Amendment does not require of the States an indictment by grand jury in a prosecution for a felony,[18] nor does it prevent trial by a jury of eight,[19] nor does it require that a witness be exempt from compulsory self-incrimination,[20] although in a federal proceeding any of these objections might be successfully urged under the Constitution. The more recent decisions of the Supreme Court show clearly that in matters of criminal procedure the question of due process is largely left to the courts in the individual States.[21] In the absence of exceptional circumstances, therefore, the determination by the State court that the right to be present can be waived, would seem to be conclusive of the question, especially since the right is one which does not go to the very essence of criminal process.[22]

JURISDICTION OF ACTIONS AT LAW CONCERNING REALTY IN FOREIGN STATE.—Under the old common law, when juries consisted of witnesses from the vicinage who were acquainted with both the parties and the facts, the venue of an action had to be laid in the county where the injury was alleged to be done.[1] But as conditions changed, and the courts sought to enlarge their jurisdiction, they modified this rule by a fiction whereby a plaintiff could allege that the transaction occurred in any county in England where he wished to bring his suit, and this allegation of venue was not permitted to be traversed except where the court deemed its truth to be material.[2] In determining whether the venue was material, they drew a distinction between transitory and local actions,—"that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality, and those in which there is such a connection."[3] It was said that real and mixed actions were local, and could be tried only by the courts of the locality where the land was situated, whereas personal actions were transitory, and could be tried anywhere.[4] This rule was so technical and so often worked injustice, that it was attacked by Lord Mansfield, who argued that the true distinction in respect of jurisdiction was between proceedings *in rem*, where the effect of the judgment cannot be had unless the thing lies within reach of the court, and actions *in personam*, where damages only are sought.[5] Lord Mansfield's view was approved by Chief Justice Marshall in the leading case of *Livingston* v. *Jefferson*,[6] and has been

[17]See McGehee, Due Process of Law, 167.

[18]Hurtado *v.* California (1884) 110 U. S. 516.

[19]Maxwell *v.* Dow (1900) 176 U. S. 581.

[20]Twining *v.* New Jersey (1908) 211 U. S. 78.

[21]Guthrie, Fourteenth Amendment, 101; McGehee, Due Process of Law, 167; Rogers *v.* Peck (1905) 199 U. S. 425, 434.

[22]See Garland *v.* Washington (1913) 232 U. S. 642, 646.

[1]1Holdsworth, History of English Law, 155, n. 9.

[2]W. S. Holdsworth, in 14 Columbia Law Rev., 551-556.

[3]See British South Africa Co. *v.* Companhia De Mocambique, L. R. [1893] A. C. 602, 618.

[4]Story, Conflict of Laws (8th ed.) § 538.

[5]See Mostyn *v.* Fabrigas (1774) 1 Cowp. 161.

[6](1811) Fed. Cas. No. 8411.